In the

United States Circuit Court of Appeals

For the Ninth Circuit

COE D. BARNARD,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendent in Error.

Reply Brief

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CHRONICLE PRINT THE DALLES, OR.

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REPLY BRIEF

INDICTMENT INSUFFICIENT

There is no difference between the position taken in the brief of the respondent and our own in relation to the general principles covering indictments in cases of this kind.

It is said on page 7 of respondent's brief,

"Where there is a general allegation of general authority conferred by law upon an officer to administer an oath it is never necessary to set out that he had particular authority to administer the particular oath in question, provided, of course, the indictment contains, as this one does, *the allegations showing the pendency of the proceeding* and materiality of the testimony in which the oath was taken."

We do not disagree with the proposition of law contained herein, provided that the indictment does show the *legal pendency of the proceeding*. Such an indictment would have

been good at common law and independent of the statute. but, to make such an indictment good it must show the steps taken to make the proceedings legally pending.

(See text book citations page 22 of Main Brief.)

It is not enough, however, to simply allege that the court or officer was engaged in taking testimony in a certain matter or between certain parties. Such an allegation does not show that there was any proceeding pending at all. It simply shows that the officer has taken it upon himself to proceed to hear testimony in the given matter; but, whether the steps have been taken which make the action or proceeding legally pending or give him *authority* to take testimony or administer an oath in the partcular matter does not appear.

Here, as we have seen, there was no attempt whatever to show that there was any proceeding legally pending or that the notices and proceedings had been had which could alone make such action legally pending.

If the officer went outside of his authority and undertook to administer an oath in a matter where the preliminary steps necessary to give him a right to so do had not been taken, his acts would be null and void and the oath could not be a basis for perjury.

It is perfectly plain therefore, we submit, that the indictment does not sufficiently show the pendency of the proceedings to constitute a good *common law* indictment.

NOT GOOD UNDER THE STATUTE——Under the provisions of the Statute (Section 5396) on the other hand, it is necessary to *allege directly* that the officer had authority to *administer the particular oath.*

"It shall be sufficient to set forth the substance of the offence charged upon the defendant and by what court and before whom *the oath* was taken, avering such court or person to have competent authority to administer *the same.*

It is perfectly clear that the words "the same" at the end of the clause refer back to the words "the oath" and that in order to come within the statute there must be and allegation that the officer had authority to administer the very oath upon which the perjury is supposed to be based—not that he had authority to "administer oaths" generally, or "in such cases," when the proceeding was properly brought before him, but that he had authority to administer *"the same" oath* upon which the perjury is based.

When we remember that this allegation was to take the place of the common law requirement that the preliminary steps should be set forth in detail which would give the officer authority to administer the oath upon which the perjury was based, there is no resisting the necessity of at least a *direct allegation of this authority* as to the particular oath under the statute.

A labored attempt is made by the learned attorneys for

respondent to make the general concluding clause of the indictment cover the defect in the charging part, and the learned attorneys with an innuendo which it seems to us might well have been left out, say "counsel for plaintiff in error seem to have ommitted or evaded calling the attention of the court to this portion of the indictment."

We omitted calling attention to it because it never occurred to us for a moment that anyone could or would contend that this general concluding summary was intended to or would cover the direct allegation required by the statute, that the officer had authority to administer the same oath upon which the perjury was based.

The part of the indictment alluded to is the mere general formal conclusion referring back to the facts already alleged in the charging part of the indictment and concluding,

"and so the grand jurors aforesaid upon their oath aforesaid do say that the said Coe D. Barnard *in manner and form aforesaid* in and by his said testimony and upon his oath aforesaid in a case in which the law of the said United States authorized an oath to be administered, unlawfully etc."

This was not the attempted statement of a fact, but a mere conclusion upon the facts already stated—not that any preliminary steps had been taken or that the officer had authority to administer this oath—but that in such cases (that is the taking of final proofs) the law of the United States authorized an oath to be administered.

It is true that the indictment charges that the United

States Commissioner was engaged in taking and hearing testimony in the matter of Watson's application, but it does not allege, either, *the things which would give him the right and authority* to take such testimony, or, the alternative fact permitted by the statute that he *did in fact have authority* to administer *the very oath* upon which the perjury is based.

The rule laid down by the Statute is a very liberal one in favor of the pleader. It permits him to cut out all the preliminary averments as to jurisdiction required by the common law, provided that he alleges directly that the officer in question did have the authority to administer *the oath in question.*. Having permitted this short cut and this simple allegation the statcte has surely done enough and the pleader, if he wishes to take advantage of it, ought surely to comply with its provisions and directly allege the one essential requirement of the statute, that the officer had authority to administer,—not oaths generally of that kind, or in such cases, but, the particular oath in question.

NOT A MERE MATTER OF FORM.—The defect in this indictment is not a mere matter of form. It is a failure to allege a substantial element of the offense,—a failure to allege. The fact that is essential to a legal perjury—a failure to allege that the officer had authority to administer the oath. Without which authority there could be no perjury.

Such defects do not come within 1025 of the Revised Statutes which meets only formal defects, and not cases where an essential element of the crime has been omitted. The cases cited in respondent's brief are not at all in point.

The case of United States vs. Rhoades, 30 Fed. 431 was altogether a different case. In that case the defendant was charged with making a false pension affidavit before a notary public, and in such cases there are no preliminary requirements whatever and the authority of the officer to administer the oath necessarily followed as a matter of law from the very fact that he was a notary public.

Revised Statutes of United States 1778 an Act of Aug. 15, 1876.

This was the ground upon which the decision of the honorable court was put.

In such cases there are no preliminary or jurisdictional requirements such as those which exist in this case.

See appellant's Main Brief, page 19 and 20.

Any person could go before a notary public and make such an affidavit, and of course as we have said, as there was nothing first to be done, the authority of the notary public followed as a necessary matter of law from the very fact of his office, and therefore the making of such an affidavit before him, if made for the purpose of defrauding the government, was a false affidavit within the meaning of the pension statutes.

If any man could go before a commissioner and make

his final proof in a case of this kind at his own option without any preliminary notice of publication, as in the matter of pension affidavits, then of course the case would be entirely different and the Rhoades case parallel with this.

But here there were preliminary steps to be attended to without which any proof would be entirely invalid and could not be the basis of perjury as is admitted in respondent's brief.

The other authorities cited in respondent's brief are merely to the effect that mere formal defects in the indictment *where each substantial element is fully covered*, will not, at least after verdict, vitiate the indictment.

But, where, as we have seen, the defect is substantial, not formal, a total failure to allege one of the things upon which the alleged perjury must be based, if based at all, is fatal.

When the indictment was presented to the defendant he had a right to know from the indictment itself whether or not the government was or was not charging a legal perjury—and if they were not charging in some way that the primary steps had been taken by which the officer would be authorized to administer the particular oath upon which the perjury was based, then he had a right to have it

quashed and dismissed without being put to the expense, annoyance and jeopardy of a trial. Therefore, the indictment itself did not show either directly or indirectly that the oath in question was one which the officer had authority to administer, it was a defect in substance and not in form, and upon its face clearly prejudicial to his rights.

It has never been held or understood that Section 1025 authorized the omission of a substantial and essential element of an offense like this.

United States vs. Davis, 6 Fed. 682.
United States vs. Carl, 15 Otto 611; s. c. 26 L. Ed. 1135.
United States vs. Morrisey, 32 Fed. 147.
More vs. United States, 160 U. S. 268.
Dunbar vs. United States, 156 U. S. 185.

Again this is not a case where the objection was made for the first time after verdict and the question should be considered as arising before a verdict and not after verdict.

More vs. Unitel States 160 U. S. 268.

There was in this case no lying by to entrap the government but the question was raised by demurer at the first opportunity and fully presented. The attention of the district attorney was challenged to the question, and he could, if he desired, and the facts justified, have gone back and perfected the indictment, but he saw fit to stand thereon at his peril, and he shoull stand there now in the same way. He is in no position to claim that it has been affected in any way by the verdict, for the question was raised and the

ruling was made when there had been no verdict and no trial.

We submit again therefore that this indictment cannot possibly stand without making Section 1025 cover substantial defects as well as mere formal matters, and to permit the omission of an essential element of an offense as created by law, which would be in the face of all the authorities.

ADMISSION OF HEARSAY EVIDENCE

It is now urged for the first time that the alleged oral admissions or statements of the claimant Watson, while not admissible for the purpose of showing the physical fact of his residence, are admissible for the purpose of showing his "intention."

We submit to the court in the first place that it is perfectly obvious that the testimony was not offered for the purpose of showing his intention, nor was it directed at all toward such a purpose.

On the contrary the questions asked did not call for his intention at all, but for a *mere narrative* as to where he had been and what he had been doing. The first question asked was,

Q. State whether or not there was anything in that conversation that showed or tended to show *where Watson had been about that time or immediately preceding it.*

It is perfectly plain that this question called for no element of intention but for a mere narrative as to the physical fact of where Watson had been and what he had been doing. It could only be admissible as an admission upon his part of his physical absence from the claim in question —an admission of the physical fact that he had not for a given period of time been upon the land in question. It called, as we have said, for no element of intention whatever and the court permitted it to be answered upon the theory that "it bore upon the question as to whether or not *Watson did state the truth* in regard to the answer that he made in making his proof." In other words it bore—and and could only bear—upon the question of whether or not he had been continuously upon the land as stated in his final proof and also in the corroboratory affidavit of the defendant.

He was permitted to answer that defendant had said he was working on the Columbia River down about St. Helens somewhere.

Again the subsequent question shows this purpose all the more plainly.

Q. What was the logging camp (where he had been working)? Did he state?

A. It was somewhere about St. Helens, somewhere down about in there, I think it was.

Transcript page 81.

It is perfectly clear that this was inadmissible.

Kirby vs. U. S. 55 and authorities cited in main brief page 27:

And so of the alleged admissions to Putman, on page 86 where it is perfectly obvious from the persistent questioning of the District Attorney that he had the double purpose of showing: First, that Watson had not been upon the land for some time, and, Second, inducing the jury to believe that Watson had been a *bad man who had been engaged in horsestealing,* and that defendant and others were associated with him therein.

Q. What was the fact about their saying anything at that time about the ranch?

A. Same objection, as incompetent, not in any way bearing upon the defendant and hearsay. Objection overruled and defendant excepted.

Whereupon the witness answered, he said he wanted to go back and prove up.

Q. *Did he say why?*

Same objection, ruling and exception.

A. He said parties wanted him to go back and prove up.

Q. *Did he say why?*

Same objection, ruling and exception.

A. He said parties wanted him to go back.

Q. Whom did he say wanted him to go back?

Same objection, ruling and exception.

A. He had reference to Mr: Hendricks:

Q. *And did he give you any reason as to why he would not go back?*

Same objection, ruling and exception.

A. He didn't think the people wanted him, I guess.

Q. *Didn't he tell you why?*

Same objection, ruling and exception.

A. No, he didn't tell me exactly.

Q. *Did he give you any reason why?*

Same objection, ruling and exception.

A. *Well, all the reason was that there were some horses run off that spring and he was hired to do it and he didn't suppose the settlers wanted him to go back.*

Whereupon the counsel for the defendant moved to strike out the conversation between the witness and Watson on the ground that the testimony is incompetent and hearsay against this defendant.

Whereupon the court asked: "The conversation was all with Watson?. A. Yes, sir.

THE COURT. Its relevancy may be as to the bearing on the question of residence upon the claim by Watson.

Whereupon the court ruled that for that plrpose it was competent and the defendant excepted and the exception was allowed.

Transcript pages 86 and 87.

Is it not perfectly plain that the object of this persistent questioning was not to show any "intention" on the part of

Watson, but to drag out his supposed admission that he had been *guilty of horsestealing* and that others presumably the defendant among them had been associated with him in that business, and thereby prevent the jury from giving the defendant the fair consideration which every defendant is entitled to at the hands of a jury?

The attempt to bring this within the intention rule is obviously far fetched and labored: In the first place it can hardly be supposed that the testimony of a corroboratory witness in a homestead case can have reference to the *intention* of the claimant. Such corroboratory witness cannot be supposed to know the intention of the entryman; all he can know is the physical facts upon the ground—the improvements thereon—the time that the entryman was there, etc. While the intention of the claimant is no doubt an important consideration in concluding as to *his* good faith in the entry, yet, it is hardly a thing about which a charge of perjury as to such corroboratory testimony ought to be based. The most that the corroboratory witness could possibly swear to in that regard was *his belief* in relation thereto. It is incredible that the government intends to have the affidavit of such a witness go farther.

It is true and we do not dispute that in proper cases declarations of the intention of a party *accompanying an act* is admissible in evidence as a part of the *res gestae* of that action. The cases cited in respondent's brief do not go any farther than this.

The Maryland case simply declares the general rule above mentioned.

The Massachusetts case was a will case, and therefore came under the peculiar rule "as to the declarations of a testator."

The Maine case cited from the 98 Maine 493, Sec. 57 Atl. 792, undoubtedly declares the true rule and makes the correct distinction. The case was one involving a question of a pauper settlement and the Court said:

"The paupers intention is a question of fact. He could have himself testified to it, and his declarations could be received in evidence of it. *but only if the accompanying acts which they explain* show that they are regarded as a *part of the acts* from which his intention be inferred."

Here as we have seen the declarations offered were not part of any actions. They were not made while the claimant was on the land, or *while he was doing any act in relation to the land*, but they were of the character of *mere narratives* made in another county, miles away from the land in question, and having reference to the whereabouts of the claimant at different times and to his supposed larceny of horses.

The California case cited by respondent is a case where the declarations against interest of a privy in title prior in point of time to the adverse party was involved and of course came under the rule of declarations against interest *where the parties are in privity.*

The New York case was similar to the Maine case and it clearly illustrates the rule. It was a declaration accom-

panying an act of the party in transferring his certificate of deposit, and, of course, was a part of the res gestae of that act.

The Wright case from the 130 Federal and the case of Brown vs. United States, from the 142 Federal are not at all in point, and the Wallace case only declares the general rule.

The same may be said of the Mutual Life Insurance Company, vs. Hillman, 145 U. S., in which the declaration in question was a letter of a person claimed to have been killed written a few days before the supposed killing, and referring to his intention and purpose in going to a certain place.

So the case from the 141 Federal was very similar and was a declaration of a party, alleged to be lost on a wrecked boat, made a short time before as to his intention to travel on said boat.

These cases are far from a case like the one under consideration and the true rule in such cases as this is presented, we think, on the contrary, in the case of Kirby vs. United States 174 U. S. 55; s. c. 43 L. Ed. 894, in which there was an attempt to use a judgment against the original thieves on a trial for receiving stolen property, such jcdgment being based upon *the confession* of the original thieves, but the Supreme Court of the United States held that the Act of Congress authorizing such admissions was unconstitutional, saying:

"But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offense for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."

So the Maine case of Corinth vs. Lincoln 34 Maine 312, says:

"But declarations cannot with propriety be received as evidence, unless the act which the declarations accompany, has itself a material bearing upon the issue presented; for the act is the principal fact, and the declarations are received, as tending to exhibit the purpose of the agent, which prompted it, and was productive of the act done."

And this doctrine is again declared by the same court in Deer Isle vs. Winterport 87 Me. 37; s. c. 32 Atl 720.

See also authorities cited in main brief, page 27. Indeed the principles were elementary.

But as we have seen, in this case it is obvious that the evidence was not offered for the purpose of showing intention—and the questions were not directed towards intention at all, and the answer to the greater number of questions objected to could not by the utmost violence be construed to have any reference to intention.

The evidence was obviously offered upon the theory that because Watson was the claimant that therefore his admissions in so far as they bore *upon his own residence*

upon the land were in a sense binding upon the defendant, or at least could be used as evidence against him and it was upon this theory, that it was competent evidence of the actual *residence* of the claimant, and not of the mere element of intention that it was admitted.

EVIDENCE OF OTHER PERJURIES

In relation to that matter we do not desire to present anything farther to the argument already made on pages 33 to 44 of the main brief, except to say that this case goes obviously much farther than the Gesner case or the Williamson case, because here there was no system or design which could possibly include the subsequent alleged perjuries, and being subsequent, they could not possibly show knowledge or intent.

We submit to the Court that the rule ought not to be extended farther.

POINT 5. ERROR OF THE COURT IN PERMITTING THE GOVERNMENT TO CROSS EXAMINE THE CHARACTER WITNESS STEWART, WHO HAD TESTIFIED TO THE *REPUTATION* ONLY OF THE DEFENDANT, AS TO ALLEGED PARTICULAR ACTS OF WRONG DOING.

The theory upon which the admission of this cross examination is attempted to be justified in the argument of the learned attorneys for respondent is sadly lacking in unity and consistency.

The witness had testified on his direct examination to the *general reputation* of the defendant only. The government upon cross examination was permitted over the objections of the defendant to cross examine the witness as to witness's knowledge of defendant's own proof upon his own homestead alleged by the district attorney to be false.

The learned attorneys for the government argue.

First. That because the witness had testified as to the good character of the defendant that therefore the government should have been permitted to cross examine him as to false statements *made to his knowledge.*

Second. That because the record shown that the witness *did not know* whether the statements were "*true or false*" that therefore the defendant was not injured.

Third. That the testimony though not admissable for the purpose for which it was offered and admitted (that is to discredit the defendant and his character witness) yet, its admission may be justified under the general drag net proposition that it was a "similar act."

This attempted grasping at straws, we submit to the Court, is the best evidence that even the learned attorney for the government is himself convinced that the admission of this testimony was error, and that no satisfactory

grounds can be found upon which to base its support.

It is true that the witness Stewart testified that he had no knowledge as to whether the statements of the witness were true or false, and there was nothing to the contrary.

This ought to dispose of one straw,—the remote and fanciful suggestion that the evidence bore upon the interest of the witness Stewart. Besides, it is perfectly clear from the whole record—from the statements of the district attorney and the responses of the Court that the testimony was neither offered or admitted upon any such ground.

But while it does not appear that the witness Stewart knew of any alleged falsity in Barnard's answer when proof was made before him yet it *does* appear from the district attorney's *own statement* that there was other testimony in the case tending to show that they were false.

We quote from page 183 of the printed transcript where Mr. Bristol says in answer to the Court's interrogatory as to whether the proof in question was on Barnard's own homestead,

"Mr. Bristol: On a place that he at that time was proving up on, *there being evidence already in the record, offered by the defendant's witnesses in that same connection, that the family, including the defendant Barnard never lived anywhere else than upon the home place of Barnard's on Butte Creek, during the entire period, etc.*"

And, as we have already said, it was obviously upon this ground that the Court permitted the testimony to go to the

jury, because it tended to discredit the witness Stewart by showing that he knew of a particular act of the defendant which the testimony of other witnesses were claimed to have proved a perjury, and it was offered by the district attorney for the very purpose of discrediting the defendant himself.

The attempt to justify the admission of this testimony upon the ground of similar acts for the purpose of showing knowledge, design, etc., seems to us hardly worth serious consideration.

It is obviously *an afterthought*, so clearly devoid of any foundation that we cannot believe this Court will consider it.

In the first place the record shows conclusively that it was not offered or admitted for any such purpose. It was not even claimed or suggested that the taking of defendant's own homestead was a part of any system or design or had any relation whatever to the Watson homestead in which defendant admitted he had no interest. Neither was it claimed that it showed any knowledge or want of knowledge in relation to Watson's compliance with the law. Besides it would in no event have been proper *cross examination* for this purpose. The record shows it was offered by the district attorney for the purpose of discrediting the defendant himself, and it seems to have been admitted by the Court upon the theory that it discredited *the witness* by showing that while he had testified that the defendant's

general reputation was good for truth and veracity, yet that he himself *personally knew* of an act of supposed falsehood.

That this cannot be done is abundantly substantiated by the authorities cited in appellant's main brief, pages 46 to 49. Indeed this is practically conceded by the learned attorneys for respondent in their brief, but the rule is sought to be evaded upon what seems to us the merest quibble.

It is true that a witness as to general good reputation may be cross examined as to what he has *heard said* about the defendant and incidentally of course as to whether he has *heard* of specific acts of reputed bad conduct, because this makes up a part of his general reputation and is therefore proper cross examination; but there is a wide distinction which all the authorities recognize, between this, and an attempt to cross examine as to acts about which the witness has not *heard,* but may have some *personal* knowledge.

A witness as to general reputation not only does not swear as to his own personal knowledge of the character of defendant, but he *would not be permitted* to testify to such personal knowledge. He might have known of a hundred honest and truthful acts of the defendant, some of which might perhaps be of great import to the jury, but he could not tell one of them, because his examination is confined under the rules of law *to general reputation alone.* So it would be manifestly unfair to permit upon cross examination the inquiry into personal knowledge of supposed bad acts.

This distinction is fully presented by the excerpts from Wigmore on page 49 of the appellant's main brief, as well as the other quotations on pages 48 and 49.

The authorities cited in appellant's main brief are nearly all cases where the witness was cross examined, not as to the witness's *own knowledge,* but as to *rumors* he had *heard* of supposed particular acts, and, of course, such cross examination is unquestionably proper.

This was the character of Commonwealth vs. O'Brien 119 Mass. Basye vs. State 63 N.W. and Randall vs. State 32 N.E., and indeed all the other cases cited.

Here the objection was timely and fully made: every objection that could be possibly made to the introduction of the testimony and the whole matter and the grounds, as the record shows, were fully and completely presented to the Court. The objections were that it was *not proper cross examination*, incompetent, immaterial, and irrelevant, and the record shows that the whole question was fully thresh-out before the Court, and we submit to the Court, that it is impossible in any way to jusify the admission of this cross examination.

FINALLY

Under this head it is said in the brief of the learned at-

torneys for respondent that the defendant has been convicted by the verdict of the jury on *abundant testimony*, etc.

Whether there was "abundant testimony" for the verdict in this case, this Court cannot know, neither is it for either the attorneys for the respondent or for us to say. We could never agree upon that question, and we respectfully submit that it is not for this Court to pass upon the "facts" or to say whether or not as a matter of fact the defendant ought to have been convicted.

It is for the Court as we understand it to pass upon the questions of law, and leave the questions of fact to be decided by a jury when the case has been submitted to a jury *according to the rules of law* as created by the government itself. When those rules have been followed—when a proper indictment has been submitted—and the case has been submitted to the jury upon legal evidence and nothing else and when the jury has returned a verdict,—then, and not till then, will the defendant be presumed to be guilty. Until that time the presumption of innocence continues to apply.

It is also said in the brief of the learned attorneys for respondent that

"In such cases as this it has long been properly the custom and practice of the Courts to disregard all technical defects or errors, *and indeed any alleged errors concerning which it does not clearly appear* that they militated heavily and wrongfully against a fair and impartial trial."

If any such a rule has ever been the practice of this Court, it has never been declared in any case so far as we know, and we do not believe it can have been the practice.

for we submit to the Court that it is contrary to every established principle.

We concede that it is for us to show there was an error in the rulings of the court, but when a ruling is presented which is apparently erroneous, the burden shifts and it is for the other side to show, and to show clearly and beyond a doubt, that there was no prejudice.

In Wilkinson vs. United States, 12 Howard 247; 13 L. Ed. 975, a bond was offered in evidence and rejected by the Court. Nothing further appeared in the record except that the bond was offered and rejected. It was argued that there might have been objections to the paper which did not appear on the record, but the Court says:

"But here the paper is shown by the statement in the exception to be legally admissable. The error, therefore, is apparent; and no presumption can be made in favor of a judgment, where the error is apparent on the record.

"If there was any fact which, notwithstanding the authentication of the copy, made it inadmissable, it ought to have been shown by the defendants, and set forth in the exception. And where no such fact appears, it must be presumed not to exist. A contrary rule would make the right to except of no value to the party, and would put an end to the revisory power of the appellate court whenever the inferior tribunal desired to exclude it."

So in Mexia vs. Oliver, 148 U. S. 664; 37 Ed. 602, the Court had permitted the introduction of certain powers of attorney, which ruling was held to be erroneous, and it was claimed that their admission was immaterial and did not prejudice the rights of the plaintiff, but the Court says:

"We cannot say that these errors were immaterial, as it

does not appear *beyond doubt* that they were errors which could not prejudice the rights of the plaintiff."

If there has ever been any other holding in the Federal Courts upon this question we have never heard of it.

So the California Supreme Court in Cahill vs. Murphy, 94 Cal. 29; 30 Pac. 195 and 196 says:

"The rule in this state is well settled that injury will be presumed from error unless the record affirmatively shows to the contrary."

And the Supreme Court of Oregon in Dubois vs. Perkins, 21 Ore. 189 in a case where the conversations of an outsider had been received in evidence over objections, says:

"How this conversation could affect or bind him does not appear; in fact its competency was not claimed on the argument here, only as it may be supposed to have been rendered competent by other evidence given upon trial, but which is not in the bill of exceptions. It was accordingly argued for the purpose of sustaining the judgment, we must presume that such evidence was actually given upon the trial. But this is not the correct rule. While it is true that error will never be presumed, the converse of the proposition is equally true. *When error does affirmatively appear it will not be presumed that it was rendered harmless or removed.*. If it were not so the respondent must see to it that the matter which renders it harmless or removes it is made to affirmatively appear in the bill of exceptions."

The citation upon this point might be multiplied indefinitely, so well is the rule established,and so unanimous the opinions of the courts thereon, but we have only cited those which are controling or which by reason of locality bear persuasively upon this Court.

It is not for us to show that the errors of the Court below

"militated heavily against us", or that they militated against us at all except that it *may have* influenced the jury. Can anyone doubt that any one of the errors we have indicated in this brief *may have* influenced the jury against the defendant? If this is true it is for the other side to show, and show *beyond doubt* under the decision of the Supreme Court of the United States in the Mexia case that it did not and could not have influenced the jury.

There is no attempt to show anything of the kind and it is perfectly clear that the admission of the testimony complained of was of such a character that it not only might, but that it surely did, influence the jury more or less. Whether or not the same verdict would have been reached if this testimony had been excluded it is impossible for this court or anyone else in the world to say, but we submit that we are entitled as a matter of law to a reversal in this case both upon the insufficiency of the indictment and upon the erroneous rulings in the admission of evidence.

Respectfully submitted,

BENNETT & SINNOTT,

Attorneys for Appellant.